

# Principles of Federal Prosecution of Business Organizations

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Chuck Rosenberg  
Hogan & Hartson  
555 13th Street, N.W.  
Washington, D.C. 20004



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# Why This Should Matter to The Money Transmission Industry

- **[C]ertain crimes that carry with them a substantial risk of great public harm, e.g., . . . *financial frauds*, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.**
  - Thompson Memo
- **To hold a corporation liable, the government must establish that the corporate agent's actions were within the scope of his duties and were motivated - at least in part - by an intent to benefit the corporation.**
  - United States v. Automated Medical Labs, 770 F.2d 399, 407 (4th Cir. 1985).
- **Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable.**
  - Automated Medical Labs, 770 F.2d at 407.

# DOJ Statistics - Criminal Prosecutions

## Criminal Cases filed in U.S. District Courts

### FY 2001 – FY 2008

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>
<b>FRAUD - Identification documents and information</b>	688	629	572	665	1,069	1,077	1,943	1,345
<b>REGULATORY OFFENSES - Reporting of monetary transactions</b>	206	165	182	226	231	189	210	196

# How DOJ Determines a Corporation's Fate

**In each instance, DOJ reviews a Corporation's:**

- Compliance program
- Voluntary disclosure of criminal conduct
- Cooperation with the Government's investigation

## **“Principles of Federal Prosecution of Business Organizations Deputy Attorney General Mark Filip (August 2008)**

Issued as a result of criticism of its predecessor memos – *where credit for cooperation arguably depended in part on waiver of the attorney-client and work product privilege.*

# History of DOJ's Written Policies

- **June 1999 - “Federal Prosecution of Corporations”**  
by Deputy Attorney General Eric Holder, Jr.  
– *The Holder Memo*
- **Jan. 2003 - “Principles of Federal Prosecution of Business Organizations”**  
by Deputy Attorney General Larry D. Thompson  
– *The Thompson Memo*
- **Dec. 2006 - “Principles of Federal Prosecution of Business Organizations”**  
by Deputy Attorney General Paul J. McNulty  
– *The McNulty Memo*
- **Aug. 2008 - “Principles of Federal Prosecution of Business Organizations”**  
by Deputy Attorney General Mark Filip  
– *“The Principles”*

# June 1999 – Holder Memo

## Federal Prosecution of Corporations Deputy Attorney General Eric Holder, Jr.



- DOJ’s first corporate charging policy on federal prosecution of corporations:
  - Advisory
  - Corporations should not be “treated leniently” nor “subject to harsher treatment” based on “their artificial nature”
  - Factors for prosecutors to consider when charging
  - Introduced connection between cooperation and potential waiver of attorney-client and work product privilege

# 2000-2002 Corporate Fraud Scandals

- Microstrategy
- Computer Associates
- Enron
- Adelphia
- Global Crossing
- Qwest Communications
- Tyco International
- WorldCom

# January 2003 – Thompson Memo

- The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to *cooperate* with a Department investigation, *in fact take steps to impede* the quick and effective exposure of the complete scope of wrongdoing under investigation.
- Compliance programs need to be “truly effective rather than mere paper programs.”

# Thompson Memo

## Principles of Federal Prosecution of Business Organizations Deputy Attorney General Larry D. Thompson



- Update of Holder Memo, but with two major changes:
  1. More plainly *required* prosecutors to apply its principles in each case of corporate criminal liability (not *advisory*)
  2. Required prosecutors to scrutinize more carefully the nature of corporate compliance programs and cooperation efforts

# Thompson: Nine Factors Relevant to a Corporate Charging Decision

1. Nature and seriousness of the offense, including risk of harm to the public
2. Pervasiveness of wrongdoing within the corporation, including whether management condoned it
3. The corporation's history of similar conduct
4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product privilege
5. The existence and adequacy of the corporation's compliance program
6. The corporation's remedial actions (includes cooperation with relevant government agencies)
7. Collateral consequences, including disproportionate harm to shareholders, employees, and others
8. Adequacy of the prosecution of individuals responsible for the corporation's malfeasance
9. Adequacy of other remedies, such as civil or regulatory enforcement.

# Prosecutorial Discretion

**In our criminal justice system, the Government retains broad discretion as to whom to prosecute. . . . [S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.**

*Wayte v. United States, 470 U.S. 598 (1985).*

# Thompson Memo's Definition of "Cooperation"

Prosecutors could weigh whether company had:

- Made available current employees and officers for government interviews, and disciplined those who refused to be interviewed
- Avoided joint defense agreements with such individuals or third parties
- \* Declined to advance attorney fees to (or indemnify) employees who are subjects or targets of the investigation, unless required by law or the corporate charter
- Waived the attorney-client privilege and work product protection.

# December 2006 McNulty Memo

## Principles of Federal Prosecution of Business Organizations Deputy Attorney General Paul J. McNulty



- Superseded the Thompson Memo
  - Identified same 9 factors relevant to a corporate charging decision, but limited the authority of prosecutors to:
  - Demand waiver of the attorney-client and work-product privilege
  - Waiver is not a prerequisite to a finding of cooperation.

# McNulty Memo

- **Prosecutors may only request waiver “when there is a legitimate need for the privileged information to fulfill their law enforcement obligations”**
- **Before requesting a waiver of even purely factual information (“Category I”), prosecutors need written approval of U.S. Attorney, who had to consult with the Assistant Attorney General for the Criminal Division**
- **Request for waiver of Category II information (attorney client communications or non-factual attorney work product) required written approval of the Deputy Attorney General**
- **Company’s responses to waiver request could be considered in “cooperation” determination**

# McNulty Memo Criticized

- Improper pressure on business entities to waive privileges in exchange for cooperation credit
- Prosecutors in the field allegedly demanding privilege waivers without the required supervision by the U.S. Attorney or Deputy Attorney General
- McNulty does not apply to other federal agencies, including SEC and others, that issued “copy-cat” policies requiring waiver in exchange for cooperation.

# The Attorney-Client Privilege Protection Act of 2007

- Senate Bill 186 - Introduced by Senator Specter and supported by more than 30 former U.S. Attorneys
- Would effectively bar DOJ from making charging decisions based on waiver of privilege
- Would prevent DOJ from penalizing a company that makes a valid assertion of privilege
- Permits a business to voluntarily waive its rights and privileges, but sets clearly defined limits on what DOJ can demand when considering whether to indict the corporation.

- United States v. Stein (SDNY)
  - DOJ investigation re: promotion of illegal tax shelters
  - KPMG gets Deferred Prosecution Agreement; 13 employees get indicted
  - Employees move to dismiss indictment -- by threatening to withhold cooperation credit from KPMG if it paid their attorney's fees, the government interfered with their right to present their defense, in violation of the Sixth Amendment
  - USDJ Kaplan agrees that the Thompson memo, and the manner in which the SDNY USAO wielded it, violated the constitutional rights of the individual defendants.

- United States v. Stein (2<sup>nd</sup> Cir. 2008):
  - “We hold that KPMG’s adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government’s overwhelming influence, and that KPMG’s conduct therefore amounted to state action.”
  - “We further hold that the government thus unjustifiably interfered with defendant’s relationship with counsel and their ability to mount a defense, in violation of the Sixth Amendment....”
  - “Because no other remedy will return the defendants to the status quo ante, we affirm the dismissal of the indictment as to all thirteen defendants.”

# August 2008 – “Principles”



## Principles of Federal Prosecution of Business Organizations Deputy Attorney General Mark Filip

- Credit for cooperation will not depend on waiver of the attorney-client privilege, but rather on disclosure of the facts known about the criminal misconduct under review
- Acknowledge that the prior guidelines “either wittingly or unwittingly” were used to coerce corporations into waiving their privilege
- Prosecutors directed not to ask for waivers
- “The government’s key measure on cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information . . .”



**Chuck Rosenberg  
Hogan & Hartson  
555 13th Street, N.W.  
Washington, D.C. 20004**

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